STATE OF MICHIGAN

COURT OF APPEALS

EDITH JOHNSON,

Plaintiff-Appellant,

v

PM GROUP, INC., d/b/a SPRING LAKE VILLAGE APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
November 1, 2005

No. 263167
Oakland Circuit Court
LC No. 2004-059941-NO

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On the evening of August 26, 2002, plaintiff went to defendant's apartment complex to visit her daughter, Cynthia Croskey. Plaintiff left her daughter's residence between 9:00 p.m. and 10:00 p.m.,[1] and as she was walking to her vehicle, she tripped on a raised portion of sidewalk and fell to the ground. Plaintiff filed suit alleging that defendant negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition, and breached an implied warranty of habitability by failing to maintain the premises in a reasonably safe condition as required by MCL 554.139. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing it owed no duty to plaintiff because the condition of which she complained was open and obvious, and was in reasonable repair for purposes of MCL 554.139.[2]

[1] Plaintiff claimed that the accident occurred at approximately 10:00 p.m.; however, the emergency room record reflects that plaintiff arrived at the hospital at 9:35 p.m.

[2] Defendant relied on deposition testimony and an affidavit from Lavette Burkett, its property manager, who stated that she had not taken notice of the raised portion of the sidewalk (i.e., had not paid particular attention to it) prior to the accident, and that no one reported the defect prior to the accident.

The trial court granted summary disposition of plaintiff's negligence claim on the ground that reasonable minds could not disagree that the condition was open and obvious, and that no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature. The trial court granted summary disposition of plaintiff's claim that defendant violated MCL 554.139 on the ground that no evidence created a genuine issue of material fact as to whether defendant failed to maintain the premises in reasonable repair.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiff acknowledged that she was looking straight ahead as she walked to her vehicle after visiting her daughter, and admitted that had she been looking at the area in which she was walking, she would have observed the defect in the sidewalk. The fact that plaintiff did not actually observe the defect prior to the accident is irrelevant. *Novotney*, *supra* at 477. It is reasonable to conclude that plaintiff would not have been injured had she been watching the area in which she was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff did not come forward with sufficient evidence to create a genuine issue of material fact as to whether an average person with ordinary intelligence could not have discovered the condition upon casual inspection. The trial court did not err in concluding that the condition was open and obvious.

Plaintiff's argument that even if the condition was open and obvious it remained unreasonably dangerous is without merit. Her failure to watch the area in which she was walking was not a special aspect of the condition itself. Moreover, the evidence showed that when plaintiff and Croskey walked to plaintiff's vehicle after the accident, they avoided the defect by simply stepping around it. Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo*. Had plaintiff watched her step, any risk of harm would have been obviated. *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997). The trial court correctly granted summary disposition of plaintiff's negligence claim.

Plaintiff's complaint also alleged that defendant breached its statutory duty to maintain the premises in reasonable repair. In every lease of residential premises, a lessor covenants: that the premises and the common areas are fit for their intended uses; and to maintain the premises in reasonable repair during the term of the lease. MCL 554.139(1). The open and obvious danger doctrine cannot be relied upon to avoid a specific statutory duty. *Jones v Enertel, Inc*, 467 Mich 266, 267; 650 NW2d 334 (2002); *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003).

Plaintiff did not produce evidence to show at what point defendant became aware of the existence of the alleged defect in the sidewalk. The property manager's testimony only showed that she had seen a crack in the sidewalk, not the allegedly dangerous condition alleged to have existed the day plaintiff was injured. No evidence showed that the alleged defect was reported to defendant prior to the accident. The trial court correctly granted summary disposition of plaintiff's claim that defendant breached its statutory duty on the ground that no evidence created a question of fact as to whether defendant failed to maintain the premises in reasonable repair. MCL 554.139.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray